

Respondent asserts the finding of the ALJ limiting claimant's impairment to two scheduled injuries should be affirmed. Respondent argues there was no medical evidence

to support a claim for permanent total disability, as well as no medical records to support a neck injury or bilateral carpal tunnel syndrome.

The issue for the Board's review is: What is the nature and extent of claimant's disability?

#### **FINDINGS OF FACT**

Claimant worked for respondent for 26 years as a package car driver. On February 1, 2006, late in her shift, she suffered an injury to her right shoulder. She reported the claim to respondent and its insurance carrier. The next day she was asked by respondent if she wanted to see a doctor, and claimant declined. She continued to work and did not seek any medical treatment. Sometime in November 2006, claimant again injured her right shoulder and again reported the injury to respondent. Claimant asked to be seen by a doctor, and an appointment was made with the company physician, Dr. Arun Sharma. Claimant was sent for an MRI, which revealed she had a torn rotator cuff on her right shoulder. Claimant was referred to Dr. Brad Meister for treatment. She underwent surgery on her right shoulder on January 5, 2007.

Claimant continued to have excruciating pain in her right shoulder after surgery and physical therapy. Respondent sent her to Dr. Lowry Jones, a board certified orthopedic surgeon who specializes in shoulder and knee treatment, for a second opinion. Dr. Jones first saw claimant on May 8, 2007, after which he took over the care for claimant's right shoulder. Claimant complained of swelling and numbness into the ulnar digits and occasionally throughout her arm. She also had swelling in her biceps and forearm. Dr. Jones said claimant's swelling was because she had an inadvertent repair of her rotator cuff to her biceps tendon. The numbness was because of her positional lack of motion called thoracic outlet syndrome. Claimant testified her neck has hurt since she underwent the first surgery on her right shoulder in January 2007, but she cannot remember if she reported neck pain to Dr. Jones.

Dr. Jones performed a second surgery on claimant's right shoulder on May 23, 2007. He sent her to physical therapy and continued to follow-up until October 2007, when he released her from treatment. However, claimant continued to have right shoulder pain limitations. Dr. Jones said she has significant scarring in her right shoulder. Claimant testified Dr. Jones told her she had nerve damage from her first surgery, and there was nothing he could do to fix or alleviate the situation. Claimant testified she has constant symptoms from the nerve damage, and the sensation goes from the biceps to the end of her fingertips. Claimant testified that by October 2007, she was also having problems with both hands. Dr. Jones ordered an EMG, which was negative.

Claimant also developed increasingly significant left shoulder pain. Dr. Jones was eventually authorized to and did treat claimant's left shoulder. He first treated the left shoulder conservatively but subsequently performed surgery on claimant's left shoulder on

April 30, 2010. Dr. Jones found claimant to be at maximum medical improvement on August 30, 2010. He ordered a functional capacity evaluation, and after seeing the results, he gave claimant permanent restrictions, to include a maximum lifting capability of 35 pounds to the waist, 15 pounds overhead, frequent lifting of 15 pounds, a push and pull limit, respectively, of 25 and 50 pounds, and a carrying capacity of 40 pounds.

Based on the *AMA Guides*,<sup>1</sup> Dr. Jones found claimant to have a 20 percent permanent partial impairment of the right shoulder and a 10 percent permanent partial impairment to the left shoulder. Dr. Jones reviewed a task list prepared by Steve Benjamin. Of the 9 tasks on the list, Dr. Jones opined claimant would be unable to perform 4 for a 44 percent task loss. Dr. Jones did not believe claimant could physically do the job as a delivery driver for respondent based on the permanent restrictions he gave her, but he also did not believe claimant was permanently and totally disabled from finding work.

Dr. Edward Prostic is a board certified orthopedic surgeon. He examined claimant on two occasions, both at the request of claimant's attorney. He first examined her on July 22, 2008. Claimant gave Dr. Prostic a history of being injured from repetitious minor trauma as a route driver for respondent. She told him that since her right shoulder surgeries, she developed similar pain in her left shoulder and numbness in her hands. She also complained of pain in the right side of her neck and in the area of her lower rib.

In his examination, Dr. Prostic found no abnormalities in claimant's cervical and thoracic spine. He stated that from overuse of her left shoulder, claimant had developed rotator cuff disease there as well. Dr. Prostic also said claimant had developed symptoms of peripheral nerve entrapment at the thoracic outlet, cubital tunnel, and carpal tunnel. He suggested claimant do strengthening and stretching exercises, but if peripheral nerve symptoms do not improve, claimant should undergo an EMG. If left shoulder symptoms do not improve, Dr. Prostic recommended claimant have an MRI to see if there is surgically repairable disease.

Dr. Prostic saw claimant a second time on February 11, 2011. Since his last examination, claimant had surgery to her left shoulder, physical therapy, and was given work restrictions. Claimant told Dr. Prostic her greatest area of pain was her right shoulder, with pain that would go from the shoulder to the elbow. On the left, she had pain mainly in the shoulder area. Claimant complained of waking in the morning with stiffness and soreness in her neck. After examining claimant, Dr. Prostic opined she sustained repetitious minor trauma to her neck and upper extremities during her employment. She had physical evidence of bilateral carpal tunnel syndrome and cervical sprain and strain. Dr. Prostic believed claimant should have an EMG and, if it was positive, then

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

decompressive surgery. X-rays of claimant's cervical spine showed a mild reversal of the lordotic curvature and degenerative disc disease at C5-6 and C6-7.

Using the *AMA Guides*, Dr. Prostic rated claimant as having a 5 percent permanent partial impairment to the whole body for aggravation of degenerative disc disease of the neck, 20 percent impairment of the right upper extremity for the shoulder, 15 percent impairment to the left upper extremity for the shoulder, and 11 percent impairment to each forearm for carpal tunnel syndrome.

Dr. Prostic provided claimant with restrictions that she should not return to work that required repetitious forceful gripping or keying, use of vibrating equipment, more than minimal use of either hand above shoulder level, or occasional lifting of more than 30 pounds. Dr. Prostic reviewed the task list prepared by Jerry Hardin. Of the 11 tasks on that list, Dr. Prostic opined claimant was unable to perform 8 for a 73 percent task loss.

The last day claimant worked for respondent was December 28, 2006. At her deposition in March 2012, claimant testified she did not believe she was capable of working anywhere other than at respondent. At the regular hearing in April 2012, claimant testified she would not be able to return to work at respondent because of her shoulder issues and her restrictions.

Jerry Hardin, a human resources consultant, interviewed claimant by telephone on March 10, 2011, at the request of claimant's attorney. He compiled a list of 11 tasks claimant had performed in the 15-year period before her work-related accident. At the time of the interview, claimant was unemployed and had a 100 percent wage loss. It is Mr. Hardin's opinion that claimant is essentially and realistically unemployable and unable to obtain or perform substantial, gainful employment. Mr. Hardin based his opinion on claimant's education, training, past work experience, transferable skills, the area she lives and worked in, and the economy. Claimant has been on Social Security disability since September 2009.

Steve Benjamin, a vocational rehabilitation consultant, interviewed claimant by telephone on April 27, 2012, at the request of respondent. He prepared a list of 9 tasks claimant performed in the 15-year period before her injury. Claimant reported to Mr. Benjamin that she graduated from high school and completed three semesters of college credit hours. She did not receive any certifications or degrees from high school. Mr. Benjamin opined that in looking at claimant's restrictions, past relevant work history, transferable skills, education, training, where she lives and how long she has been out of the labor market, claimant should still be able to re-enter the open labor market. He believed claimant could find employment as a companion, counter clerk, van driver or sales clerk. Mr. Benjamin discovered that claimant had worked from September 2009 through August 2010 part time. This information did not affect his opinion concerning claimant's employability.

### PRINCIPLES OF LAW

K.S.A. 2005 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2005 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

### ANALYSIS

Two physicians provided deposition testimony in this claim. Dr. Prostic provided impairment ratings for claimant's upper extremities and cervical spine, which, coupled with a wage loss, could result in work disability under K.S.A. 2006 Supp. 44-510e. Dr. Jones found that claimant sustained injuries to both shoulders and provided an impairment rating for each shoulder, creating a presumption of permanent total disability. Neither of these issues was analyzed in the award.

The ALJ in this matter found that the opinion of Dr. Jones was more persuasive than the opinion of Dr. Prostic. The ALJ provided no analysis regarding why he disregarded Dr. Prostic's opinions. While the ALJ's reasoning may be sound as to why Dr. Prostic's opinions should be given no weight, the order should offer some analysis regarding how he arrived at that conclusion.

K.S.A. 44-510c(a)(2) creates a rebuttal presumption in favor of permanent total disability when, as the result of a work-related injury, a claimant experiences a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof. "If the presumption is not rebutted by evidence in the record, . . . compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c as a permanent total disability."<sup>2</sup>

In addition to the presumption of permanent total disability, claimant presented evidence she is essentially and realistically unemployable. A person is permanently and totally disabled when he or she is "essentially and realistically unemployable."<sup>3</sup> The ALJ did not comment on this evidence.

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<sup>2</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 529, 154 P.3d 494 (2007).

<sup>3</sup> *Wardlow v. ANR Freight Systems*, 19 Kan.App.2d 110, 113, 872 P.2d 299 (1993).

**CONCLUSION**

The Board finds that the ALJ did not adequately address the essential issues in this claim involving functional impairment, work disability and permanent total disability.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated February 15, 2013, is reversed and this case is remanded to the ALJ with directions to address the issues of how he assessed weight to the medical evidence, the presumption of permanent total disability, and whether respondent produced evidence sufficient to rebut the presumption.

The record is closed and shall not be reopened to include new evidence. The Board does not retain jurisdiction in this matter.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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